

PennDOT has reviewed Draft Chesapeake Bay Total Maximum Daily Load (Draft Bay TMDL) and offers the following comments.

It is well documented that runoff from roadway surfaces is not a major source of nitrogen and phosphorous loading in surface waters because the primary sources of these nutrients are atmospheric deposition and fertilizer applications. PennDOT limits its use of fertilizers to promoting the establishment of turf and other planting where none existed. PennDOT does not use fertilizers on established vegetation within its right of way except in limited instances to control invasive broad leaf plants while promoting turf establishment. PennDOT has detailed policies for the applications of fertilizers. Adjacent land use is likely one of the more important factors influencing their associated concentrations in highway runoff. Therefore, these comments will focus on the Chesapeake Bay TMDL as it relates to sediment.

The greatest potential for roadways to generate sediment is when roadway maintenance and improvement projects are conducted. By complying with PADEP's existing regulatory program for construction activities and with PennDOT's policies contained in the Drainage Manual and by designing projects consistent with the standards contained in approved Act 167 plans, the potential generation of sediment from these activities is addressed.

Page 4-25 provides: "EPA's intent in creating the MS4 Stormwater Program was to regulate stormwater discharges by requiring the municipalities to develop management programs to control stormwater discharging via the MS4, i.e., stormwater collected by the MS4 from throughout its service area." The existing regulatory program for construction activities coupled with PennDOT's policies satisfy this intent. PennDOT's service area is the rights of way from its roadways that were located in regulated urbanized areas. PennDOT has policies on erosion and sedimentation, post construction stormwater control, maintenance activities, and fertilizer applications that manage stormwater in its rights of way. Unlike municipal MS4 who may have jurisdiction over the development and use of land within their municipal boundaries, PennDOT has no authority to regulate the use or development of adjacent properties. PennDOT will bear the costs of the implementation of the "new" standards which will be funded using State and Federal monies (i.e., the taxpayer) and would reduce the number of completed projects necessary to protect the safety of the traveling public. Given the potential to impact Federal funds received by DOTs, EPA should consult with FHWA, a sister agency, prior to imposing any additional standards or recommending the expansion of the MS4 area beyond regulated urbanized areas.

On page 7-2 of the Draft Bay TMDL, EPA states: "Without a demonstration of reasonable assurance that nonpoint source allocations will be met, a TMDL would have to assign all the necessary reductions to the point sources." PennDOT would like a detailed legal justification for this position. PennDOT maintains that the CWA does not require that a TMDL be achieved through point source reductions only. Rather, the TMDL should be based on the contribution of the activity to the impairment. Making a permittee meet more stringent standards when the permittee is not responsible for that magnitude of contribution is a regulatory taking and a serious violation of the permittee's

due process rights. The point source permittees should not have to bear the financial burden caused by sediment contributions from other known sources, e.g., agriculture activities (70% contribution) and timber activities (19% contribution).

EPA will never achieve the desired load allocation in the Bay Watershed solely through regulated point sources. This is easier for EPA given the fact that they have some statutory jurisdiction over these sources. However, to achieve the TMDL by placing more responsibility on the point sources will essentially eliminate necessary activities. For example, the State DOTs are also in a funding crisis. In PA, in response to changes in the NPDES program and litigation, PADEP has over the years increased their BMP requirements for both E&S controls and post construction controls which have resulted in increased project costs. As a result, fewer projects are completed. These shelved projects are based on public health, safety, and welfare needs. If the Bay TMDL plan imposes even stricter controls, project costs will again increase and even fewer needed projects will be completed. The same can be said of waste water treatment plants. These plants serve a critical need regarding a basic human bodily function. Imposing greater controls could cause some of these plants to go into bankruptcy or will result in greater costs to the general public which will result in an impact to the economy because the general public will have less to spend. The same can be said regarding the regulation of industrial discharges.

The Bay TMDL needs to be grounded in reality and directly related to the activities contributing to sediment loads. According the Pennsylvania's draft Watershed Implementation Plan (PA WIP) for the Bay (page 13), agriculture contributes to 70% of the sediment load allocations. Forest and the associated timbering activities contribute to 19% of the sediment load allocations. Stormwater from urban and developed areas contribute 10 percent and point sources contribute 0.6% of the sediment load allocations. The PA WIP (page 10) defines point sources as including permits for MS4s and construction activities which are the activities relevant to PennDOT projects. Imposing greater controls on regulated point sources which are contributing 0.6 % of the sediment load allocation will result in significant costs to the regulated and general public without realizing any real benefit to the Bay.

Based upon the above discussion, PennDOT disagrees with the imposition of high level backstop allocation for PA point sources imposed on PADEP as a result of EPA's review of the PA WIP. See Draft Bay TMDL page 8-19. Specifically, PennDOT disagrees with the following back stop TMDL:

“MS4s: 50 percent of urban MS4 lands meet aggressive performance standard through retrofit/ redevelopment; 50 percent of unregulated land treated as regulated, so that 25 percent of unregulated land meets aggressive performance standard; designation as necessary.”

First, what legal authority does EPA have for setting waste load allocations backstops for the PA WIP? Second, retrofits should not be required of all MS4s. The contribution of the MS4 should be considered. As discussed above in detail, for sediment, the

contribution of MS4s to the sediment loads in the Bay are minuscule, so imposing additional standards on MS4s will result in no benefit to the Bay. Retrofits would be extremely costly to PennDOT to implement with minimal benefit to the load allocation.

Third, neither EPA nor PADEP have the regulatory authority to impose standards on properties located outside the urbanized MS4 areas defined in the Clean Water Act. The Phase II regulations provide the State (not EPA) with the discretion to designate areas other than urbanized areas determined by the Census. 40 C.F.R. §122.32. To designate additional areas, a determination must be made that the MS4 contributes substantially to the pollutant loadings. 40 C.F.R. § 123.35(b). No factual support has been provided to support designating additional areas for coverage under the MS4 permit program. The significant contributors of sediment in PA are agriculture and timbering activities.

Fourth, PennDOT maintains the position that retrofits can only be required under the MS4 permit program if a project within the regulated urbanized areas requires an NPDES permit for construction activities and results in an increased discharge. Retrofits are post construction stormwater controls. Post Construction Stormwater Controls are only required for new development or redevelopment projects greater than or equal to one acre. 40 C.F.R. §122.134(b)(5).

Fifth, PennDOT further maintains that a permittee can only be subject to retrofits under an NPDES permit for construction activities if the permittee is a contributor to the impairment. As stated above, in Pennsylvania, only 0.6% of the 2009 load allocation for sediment is from point sources. The 0.6% includes contributions from wastewater facilities, industrial facilities, combined sewer overflows, sanitary sewer overflows, NPDES permitted stormwater (MS4s and construction and industrial sites), and CAFOs. See page 10 of the PA WIP. The contribution of sediment to the Bay from PennDOT's MS4 is minuscule. PennDOT's MS4 contribution is addressed through the application of the recently revised PADEP regulations at 25 Pa. Code Chapter 102 to PennDOT's projects.

Finally, PennDOT questions the science behind the Chesapeake Bay model. PennDOT participates in the Urban Stormwater Subgroup. The group attempted to obtain feedback from the model by entering scenarios. Without dispute, stormwater BMPs are more effective in a series. However, reductions for multiple BMPs used in a series could not be accurately calculated. The model accounted for reductions in the sediment loads only for one BMP in the series. This resulted in an inaccurate load output from the model. This leads PennDOT to question EPA's evaluation of the PA WIP if the model was used. For sediment, PA was only 1% off the target. Based on PennDOT's experience with building model scenarios, PennDOT believes that the sediment loads generated by the model is higher than actual conditions given the model's flaw in calculating reductions in loads for BMPs in a series. PennDOT believes that the PA WIP actually meets its target. In addition, PennDOT questions the load outputs from the model for the 2009 baseline. The 2009 loads used to evaluate PA's reductions may be higher than actual conditions due to the limited effectiveness of the model.

On page 8-8, EPA found the stormwater section of the PA WIP to meet few expectations. PennDOT disagrees with this conclusion. PADEP just revised its regulations that administer the NPDES stormwater program. The revisions include standards for volume control, rate control, and water quality. The revisions also include a retrofit element by requiring that 20% of existing impervious surfaces for redevelopment projects be considered meadow when evaluating the volume standards. It is PennDOT's understanding that EPA reviewed these revisions to ensure consistency with the NPDES program and approved these revisions. In reviewing the PA WIP, EPA did not give sufficient credit to these existing regulatory practices.